88-663

Supreme Court, U.S.
FILED
OCT 18 1988
JOSEPH F. SPANIOL, JR.
CLERK

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

ALLSTATE INSURANCE COMPANY,
Petitioner,

VS.

NEIL J. SCHON and WALTER J. HERBERT, JR.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT E. FREITAS
Counsel of Record
CARL W. CHAMBERLIN
ORRICK, HERRINGTON & SUTCLIFFE
600 Montgomery Street
San Francisco, CA 94111
Telephone: (415) 392-1122

DAVID E. BOCAN
DENENBERG, TUFFLEY, BOCAN, JAMIESON, BLACK, HOPKINS & EWALD
88 Kearny Street, 21st Floor
San Francisco, CA 94108
Telephone: (415) 781-4144
Counsel for Petitioner

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTIONS PRESENTED

1. Is the "bright-line" rule conclusively presuming that fictitious defendants are nondiverse, announced by the Ninth Circuit in *Bryant v. Ford Motor Co.*, inconsistent with federal statutes and the decisions of this Court?

2. Can a state procedural device permitting a plaintiff to name fictitious defendants, which exists in some states but not in others, foreclose the right of removal under federal law?

3. Where a state case that includes fictitious Doe defendants has been removed without challenge, diversity jurisdiction existed as between the named parties, and the district court entered a final judgment, must the judgment be vacated and the case remanded to state court?

4. Is a notice of appeal ineffective if filed during the pendency of a postjudgment motion brought within 10 days of entry of judgment on grounds peculiar to Federal Rule of Civil Procedure 60(b)?

PARTIES

The parties to this action are Neil J. Schon, Walter J. Herbert, Jr., and Allstate Insurance Company ("Allstate"), successor to Northbrook Excess and Surplus Insurance Company ("Northbrook"). The Complaint also listed as defendants "Does One through Twenty," but did not describe or otherwise identify them or specifically charge them with any actionable conduct. Allstate is the successor corporation to Northbrook pursuant to merger effective January 1, 1985. Northbrook no longer exists. Allstate's corporate parent, subsidiaries and affiliates are listed in Appendix E.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties	ii
Table Of Contents	iii
Table Of Authorities	v
Opinions Below	1
Jurisdiction	2
Statutes Involved	2
Statement Of The Case	2
Reasons For Granting The Writ	4
I.	
Remand Of The Case Conflicts With Federal Statutes And Decisions Of This Court.	5
A. The Ninth Circuit's Bright-Line Rule In *Bryant* Directly Conflicts With The Removal Statutes And The Decisions Of This Court	7
1. *Bryant* Conflicts With Decisions Of This Court Entitling A Removing Party To Show That Non-Diverse Defendants Are Unnecessary Or Wrongfully-Joined Parties	7
2. The *Bryant* Rule Precludes Uniform Application Of Federal Law	10
3. *Bryant* Conflicts With Federal Law And Congressional Policy Requiring Early Removal	12
4. *Bryant* Conflicts With Federal Law Precluding Remand After Final Judgment	13
II.	
Dismissal Of The Appeal For Lack Of Jurisdiction Conflicts With Federal Law By Improperly Eliminating The Distinction Between Motions Brought Under Rule 59(e) And Motions Brought Under Rule 60(b)	14
Conclusion	19

TABLE OF CONTENTS

Page

INDEX TO APPENDICES

Appendix A. Ninth Circuit's Order of July 1, 1987, Dismissing Appeal for Lack of Jurisdiction A-1

Appendix B. Ninth Circuit's Order of July 20, 1988, Denying Allstate's Petition for Rehearing and Remanding Case B-1

Appendix C. District Court's Memorandum and Order. C-1

Appendix D. Pertinent Statutes Involved D-1

Appendix E. List of Petitioner's Parent and Subsidiaries. E-1

TABLE OF AUTHORITIES

Cases

Page

Acosta v. Louisiana Dep't of Health and Human Resources, 478 U.S. 251 (1986) 15

Barnes v. Wilson, 40 Cal. App. 3d 199, 114 Cal. Rptr. 839 (1974) 6

Barry v. Bowen, 825 F.2d 1324 (9th Cir. 1987) 16, 17

Bryant v. Ford Motor Co., 844 F.2d 602 (9th Cir.), *cert. granted,* 57 U.S.L.W. 3230 (Oct. 3, 1988) .....*passim*

Buchanan v. Stanships, Inc., 108 S.Ct. 1130 (1988) 18

Burlington Northern Ry. Co. v. Woods, 480 U.S. 1 (1987) 11

Butler v. Pearson, 636 F.2d 526 (D.C. Cir. 1980) 17, 18

Chesapeake & Ohio Ry. Co. v. Cockrell, 232 U.S. 146 (1914) 8

Chism v. National Heritage LIfe Insurance Co., 637 F.2d 1328 (9th Cir. 1981) 8

City of Minneapolis v. Reum, 56 Fed. 576 (8th Cir. 1893) 10

Dove v. Codesco, 569 F.2d 807 (4th Cir. 1978) 16

Gamble v. General Foods Corp., 846 F.2d 51 (9th Cir. 1988) 5, 13

Grigg v. Southern Pacific Co., 246 F.2d 613 (9th Cir. 1947) 7, 8, 11

Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1982) 15

Grubbs v. General Electric Credit Corp., 405 U.S. 699 (1972) 7, 11, 13, 14

Hahn v. Becker, 551 F.2d 741 (7th Cir. 1977) 16, 17

Hise v. Garlock, Inc., 841 F.2d 342 (9th Cir. 1988) 5

Mas v. Perry, 489 F.2d 1396 (5th Cir.), *cert. denied,* 419 U.S. 842 (1974) 10

McDermott v. Lehman, 594 F. Supp. 1315 (D. Me. 1984) 17

Miller v. Transamerican Press, Inc., 709 F.2d 524 (9th Cir. 1983) 15, 16

TABLE OF AUTHORITIES

CASES

Page

Powers v. Chesapeake & Ohio Ry. Co., 169 U.S. 92 (1898) 7, 12

Pullman Co. v. Jenkins, 305 U.S. 534 (1939) 7, 8, 9, 10

Rankin v. Heckler, 761 F.2d 936 (3d Cir. 1985) 16

Salem Trust Co. v. Manufacturers' Finance Co., 264 U.S. 182 (1924) 8

Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100 (1941) 7, 11

Sierra On-Line, Inc. v. Phoenix Software, Inc., 739 F.2d 1415 (9th Cir. 1984) 17

Stewart Organization, Inc. v. Ricoh Corp., 108 S. Ct. 2239 (1988) 11

Stifel v. Hopkins, 477 F.2d 1116 (6th Cir. 1973) 10

Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336 (1976) 10

United States v. Gargano, 826 F.2d 610 (7th Cir. 1987) 16

United Steelworkers of America v. R.H. Bouligny, Inc., 382 U.S. 145 (1965) 10

Vreeken v. Davis, 718 F.2d 343 (10th Cir. 1983) 16

White v. New Hampshire Dep't of Employment Security, 455 U.S. 445 (1982) 17, 18

Wilburn v. Pepsi-Cola Bottling Co., 492 F.2d 1288 (8th Cir. 1974) 16, 17

Wilson v. Republic Iron & Steel Co., 257 U.S. 92 (1921) 8, 9, 10

Statutes

California Code of Civil Procedure:
§ 474 2
§ 583.210 12
United States Code:
Title 28, § 1254(1) 2
§ 1332 ..... 2, 10

TABLE OF AUTHORITIES

STATUTES

	Page
§ 1441	2, 10
§ 1446	2
§ 1446(b)	7, 12
§ 1447	2
§ 1447(c)	7, 13
§ 1447(d)	7
§ 2101	2

Rules

Federal Rules of Appellate Procedure:
Rule 4(a)(4) 2, 3, 5, 14, 15, 16, 18, 19

Federal Rules of Civil Procedure:
Rule 17(a) .....
50(b) 4
52(b) 4
59 18
59(a) 4
59(e) 2, 4, 15, 16, 17, 18, 19
60 ..... 2, 15, 16, 17, 18
60(b) 2, 3, 4, 15, 16, 17, 18, 19

Rules of Ninth Circuit Court of Appeals:
Rule 19(b) 3

Secondary Authorities

Advisory Committee Note to 1966 Amendment to Fed. R. Civ. P. 17 8

10C California Forms of Pleadings and Practice (1988). 6

3 Cong. Rec. 4302 (1874) 12

Note, Doe Defendants and Other State Relation Back Doctrines in Federal Diversity Cases, 35 STAN. L. REV. 297 (1983) 6

R. Weil & I. Brown, California Practice Guide: Civil Procedure Before Trial (1988) 6

West's California Code Forms, Civil Procedure (1981).. 6

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

ALLSTATE INSURANCE COMPANY,
Petitioner,

VS.

NEIL J. SCHON and WALTER J. HERBERT, JR.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Allstate Insurance Company ("Allstate") respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinions and decisions delivered in this case have not been reported. A copy of the Ninth Circuit's Order of July 1, 1987, dismissing respondents' appeal for lack of jurisdiction appears as Appendix A. A copy of the Ninth Circuit's Order of July 20, 1988, denying Allstate's petition for rehearing as moot and remanding the case to the district court with instructions to remand the matter to state court, appears as Appendix B. A copy of the district court's Memorandum and Order appears as Appendix C.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). On July 1, 1987, a motions panel of the United States Court of Appeals for the Ninth Circuit (the "Ninth Circuit") dismissed respondents' appeal for lack of jurisdiction. Allstate filed a Petition for Rehearing and Suggestion for Rehearing En Banc on July 15, 1987. On July 20, 1988, the Ninth Circuit denied rehearing and remanded the case to the district court with instructions to remand to state court. This petition is filed within the 90 days allowed by 28 U.S.C. § 2101.

STATUTES INVOLVED

This case involves 28 U.S.C. §§ 1332, 1441, 1446 and 1447, Federal Rules of Civil Procedure 59(e) and 60(b), Federal Rule of Appellate Procedure 4(a)(4), and California Code of Civil Procedure section 474, the pertinent portions of which are set forth in Appendix D.

STATEMENT OF THE CASE

On July 18, 1985, respondents Neil J. Schon, lead guitarist for the rock group Journey, and Walter J. Herbert, Jr., manager of Journey, filed a complaint in the Superior Court of California, in and for the City and County of San Francisco, against Allstate Insurance Company ("Allstate"), Northbrook Excess and Surplus Insurance Company ("Northbrook") and Does One through Twenty. The complaint alleged that "defendants" breached a contract and committed various torts in connection with respondents' tax shelter investment in wind turbine generators.

Within 30 days after receiving the complaint, Allstate, on behalf of itself and as successor to Northbrook, removed the action to the United States District Court for the Northern District of California.[1] In its verified petition for removal, Allstate

---

[1] Allstate based jurisdiction on 28 U.S.C. § 1441, asserting that the action could have been brought in federal court pursuant to 28 U.S.C. § 1332 and was timely removed.

alleged that the Doe defendants were wholly fictitious and without any interest in the action and that no relief could be granted against them. Allstate's contentions were not disputed by respondents, and respondents never objected to the removal, questioned the jurisdiction of the district court, or moved for remand.

The district court dismissed respondents' complaint with prejudice on May 7, 1986. On May 16, 1986, respondents filed a "motion for reconsideration" of the court's order of dismissal, stating that the motion was made pursuant to and was governed by Federal Rule of Civil Procedure 60(b). In their motion, respondents argued that the order should be set aside on grounds specifically mentioned in Rule 60(b)(1) as grounds to set aside a judgment.

While respondents' motion for reconsideration was pending in the district court, respondents filed a notice of appeal. After respondents addressed various procedural matters not directly at issue in this petition, the appeal was dismissed for respondents' failure to perfect their appeal in accordance with Ninth Circuit rules.[2] In April, 1987, respondents moved to have their appeal reinstated or, in the alternative, dismissed for lack of jurisdiction.

---

[2] Respondents filed their notice of appeal on July 7, 1986, after obtaining an extension of the time to file. On August 8, 1986, a conference attorney for the Ninth Circuit noted that the notice of appeal was filed while the Rule 60(b) motion was pending and ordered respondents to withdraw the appeal or to show cause why it should not be dismissed for lack of jurisdiction under Federal Rule of Appellate Procedure 4(a)(4). On August 22, 1986, respondents filed a Notice of Withdrawal of Appeal. On September 18, 1986, respondents moved to strike their notice of withdrawal of appeal and moved for a remand of the case so that the district court could rule on their Rule 60(b) motion. On October 15, 1986, the Ninth Circuit granted the motion to strike the notice of withdrawal of appeal and denied the motion for a remand because the district court had not indicated that it was inclined to grant the Rule 60(b) motion. In late October, 1986, respondents were reminded to comply with the Ninth Circuit's order of August 8, 1986. Respondents failed to comply. On April 8, 1987, the Ninth Circuit dismissed the appeal under Ninth Circuit Rule 19(b) for respondents' failure to perfect the appeal.

On July 1, 1987, a motions panel of the Ninth Circuit reinstated the appeal, and then dismissed the appeal for lack of jurisdiction. The order was apparently made on the ground that the Court of Appeals did not have jurisdiction because the Rule 60(b) motion was pending in the district court when respondents filed their notice of appeal. Federal Rule of Appellate Procedure 4(a)(4) states that a notice of appeal filed before the disposition of a motion brought under Federal Rule of Civil Procedure 50(b), 52(b), 59(a), or 59(e) has no effect. Apparently, the motions panel treated the Rule 60(b) motion as a Rule 59(e) motion subject to Rule 4(a)(4) because the motion was filed within 10 days after the district court's judgment.

On July 15, 1987, Allstate filed a Petition for Rehearing and Suggestion for Rehearing En Banc, explaining that a motion designated as a Rule 60(b) motion, which seeks relief on grounds peculiar to Rule 60(b), may not be considered a motion subject to Rule 4(a)(4).

While Allstate's petition was pending, and more than one year after this case had been dismissed with prejudice on the merits, the Ninth Circuit decided *Bryant v. Ford Motor Co.*, 844 F.2d 602 (9th Cir.), *cert. granted,* 57 U.S.L.W. 3230 (1988). In *Bryant*, the Ninth Circuit overruled four prior Ninth Circuit opinions and created a new "bright-line" rule that the presence of fictitious Doe defendants in a state court complaint destroys diversity of citizenship and precludes removal of the case to federal court.

On July 20, 1988, on the basis of *Bryant*, the Ninth Circuit denied Allstate's petition for rehearing as moot, rejected the suggestion for rehearing en banc, and remanded the case to the district court with instructions to remand the matter to state court.

REASONS FOR GRANTING THE WRIT

As shown below, the Ninth Circuit's order directing the district court to remand this case to state court conflicts with federal statutes and applicable decisions of this Court. The Ninth Circuit's dismissal of the appeal under Federal Rule of Appellate

Procedure 4(a)(4) frustrates the intent of the drafters of the Federal Rules of Civil Procedure and conflicts with applicable decisions of this Court and with the decision of another federal court of appeals.

I

REMAND OF THE CASE CONFLICTS WITH FEDERAL STATUTES AND DECISIONS OF THIS COURT

On July 20, 1988, the Ninth Circuit ordered that this case—which was dismissed on the merits in district court two years earlier—must be remanded to state court on the basis of the recent decision in *Bryant v. Ford Motor Co.*, 844 F.2d 602 (9th Cir.), *cert. granted,* 57 U.S.L.W. 3230 (Oct. 3, 1988). The order was apparently made because respondents had listed fictitious Doe defendants in the caption of their state court complaint.

Under the *Bryant* rule, a case in which Doe defendants are named cannot be removed unless a plaintiff substitutes real parties for the Does, the Does are dismissed, or the plaintiff "unequivocally abandons" the Does. *Bryant*, 844 F.2d at 605-06. Unequivocal abandonment occurs where the plaintiff drops the Doe defendants from the complaint or trial commences without service of the Doe defendants. *Id.* at 606 n.5. The Ninth Circuit made its new rule applicable to "pending cases," *id.* at 606 n.7, requiring the district courts in the Ninth Circuit to remand cases that had been removed with Does in the complaint.

Here, the Ninth Circuit's application of the *Bryant* rule arguably nullifies the judgment Allstate obtained prior to the time *Bryant* was decided, and deprives Allstate of the forum to which it is entitled under federal law, merely because phantom Does were listed in the caption of a complaint. The ramifications of the Ninth Circuit's bright-line rule extend far beyond this case, however: *Bryant* threatens to upset the application of federal removal law across the nation.

Not only has the Ninth Circuit dismissed pending appeals in other cases on the basis of *Bryant* (*e.g., Hise v. Garlock, Inc.*, 841 F.2d 342 (9th Cir. 1988); *Gamble v. General Foods Corp.*, 846 F.2d 51 (9th Cir. 1988)), the *Bryant* decision invites the whole-

sale foreclosure of removal from California state courts. Given *Bryant's* conclusive presumption that fictitious defendants are nondiverse entities, a plaintiff may prevent removal simply by listing defendants who do not even exist. By its terms, California Code of Civil Procedure section 474 allows a plaintiff to designate a defendant by a fictitious name if the plaintiff does not know the defendant's true name. It is the standard practice of plaintiffs in California, however, to use section 474 to name large numbers of Does, with no more than a boilerplate allegation that the fictitious defendants are somehow implicated in the purported wrongdoing, in order to toll the statute of limitations as to any unknown entity who might spring up later and be included as a defendant. Indeed, a Doe can be named under California law without any allegation that the Doe committed any actionable conduct. *Barnes v. Wilson,* 40 Cal. App. 3d 199, 205, 114 Cal. Rptr. 839, 844 (1974).[3]

The Ninth Circuit's rule threatens to affect removal jurisdiction in states other than California: more than 30 states allow suit to be brought against parties with no names. Note, *Doe Defendants and Other State Relation Back Doctrines in Federal Diversity Cases,* 35 Stan. L. Rev. 297, 300-01 n.14 (1983). Following the Ninth Circuit's lead, district courts in other circuits may also curtail congressionally-defined removal jurisdiction by precluding the removal of suits brought against "phantoms," who "live not and are accused of nothing." *Grigg v. Southern Pacific Co.,* 246 F.2d 613, 620 (9th Cir. 1947).

---

[3] Treatises and form books on California law recommend the use of Doe allegations even if the plaintiff does not have any real person in mind. *See, e.g.*, R. Weil & Brown, California Practice Guide: Civil Procedure Before Trial § 6:58.1 at 6-10 (1988); West's California Code Forms, Civil Procedure, § 474 at 475 (1981). Printed form complaints approved by the California Judicial Council contain Doe allegations like the ones in this case. *See, e.g.,* 10C California Forms of Pleadings and Practice, at 83 (1988) (example of printed form tort complaint.)

The Ninth Circuit expressed skepticism in *Bryant* that reflexive Doe practice is commonplace in California. *Bryant,* 844 F.2d at 606 n.6. A review of these forms and the files of any California state court reveals that Does are named in virtually every complaint filed in California courts.

Finally, the effect of the Ninth Circuit rule is even more ominous in light of the fact that a district court's remand order is generally not appealable, 28 U.S.C. § 1447(d). Unless certiorari is granted, litigants across the country may be denied access to the federal courts on the basis of a rule, expressly based on considerations of administrative convenience rather than precedent, which directly conflicts with decisions of this Court and the federal removal statutes.

A. The Ninth Circuit's Bright-Line Rule In *Bryant* Directly Conflicts With The Removal Statutes And The Decisions Of This Court

The Ninth Circuit's bright-line rule precluding removal when fictitious Does are named directly conflicts with federal statutes and this Court's removal decisions in at least four ways. First, the rule conflicts with this Court's holding that a removing party may demonstrate that fictitious defendants are unnecessary or wrongfully-joined entities, which do not preclude removal. *E.g., Pullman Co. v. Jenkins,* 305 U.S. 534 (1939). Second, the rule precludes the uniform application of federal law, in contravention of the decisions of this Court. *See Grubbs v. General Electric Credit Corp.,* 405 U.S. 699, 705 (1972); *Shamrock Oil & Gas Corp. v. Sheets,* 313 U.S. 100, 104 (1941). Third, the rule conflicts with the intent of Congress, as recognized by this Court, that removal occur as early in a case as possible. *See Powers v. Chesapeake & Ohio Ry. Co.,* 169 U.S. 92, 100 (1898); 28 U.S.C. § 1446(b). Fourth, the rule conflicts with the federal statute and decisions of this Court that demonstrate that remand is required only if it is determined *prior* to judgment that the case was removed improvidently and without jurisdiction. *Grubbs,* 405 U.S. 699; 28 U.S.C. § 1447(c).

1. *Bryant* Conflicts With Decisions Of This Court Entitling A Removing Party To Show That Non-Diverse Defendants Are Unnecessary Or Wrongfully-Joined Parties

The Ninth Circuit's bright-line rule precluding removal of any case containing Doe defendants, without any inquiry into the possible citizenship of the Does or the reasons they were included

in the complaint, holds that "[t]he nature of the allegations against such Doe defendants is irrelevant for federal removal purposes." *Bryant,* 844 F.2d at 605. This rule, which conclusively presumes that phantom defendants are non-diverse entities who have been charged with some actionable conduct, directly conflicts with decisions of this Court and denigrates the sober and careful consideration appropriate in determining whether federal jurisdiction exists.

Federal law does not accept the notion of an unnamed, unidentified, non-existent Doe, whether as a defendant or as a plaintiff. There is no provision in the federal statutes or rules authorizing the use of such non-existent defendants, and Federal Rule of Civil Procedure 17(a) provides that actions shall be prosecuted only in the name of the real party in interest. Fictitious Does cannot be named on the mere posibility that some unidentified claim exists on behalf of an unknown party. *See* Advisory Committee Note to 1966 Amendment to Fed. R. Civ. P. 17.

It is anomalous to proclaim that federal diversity jurisdiction does not exist because of the presumed citizenship of a phantom that federal law does not recognize. Indeed, Ninth Circuit decisions prior to *Bryant* recognized that wholly fictitious Does are phantoms and disregarded such Does for the purpose of removal based on diversity, at least where the verified removal petition showed them to be sham. *See, e.g., Chism v. National Heritage Life Insurance Co.,* 637 F.2d 1328 (9th Cir. 1981); *Grigg v. Southern Pacific Co.,* 246 F.2d 613 (9th Cir. 1957).

Furthermore, this Court has held that entities similar to Does cannot preclude removal. For example, removal is not foreclosed by the non-diversity of a formal or unnecessary party. *Salem Trust Co. v. Manufacturers' Finance Co.,* 264 U.S. 182 (1924) (presence of non-diverse defendant trust company, a stakeholder between two competing claimants, did not destroy diversity because the company was not necessary for adjudication of the dispute between the claimants). Nor may removal be prevented by the fraudulent or wrongful joinder of non-diverse parties. *Pullman Co. v. Jenkins,* 305 U.S. 534 (1939); *Chesapeake & Ohio Ry. Co. v. Cockrell,* 232 U.S. 146, 152 (1914). *See Wilson v. Republic Iron & Steel Co.,* 257 U.S. 92, 97-98 (1921) (fraudu-

lent joinder is the joinder of parties "without any reasonable basis in fact and without any purpose to prosecute the cause in good faith").

As shown by the complaint and the uncontroverted allegations in Allstate's removal petition, the Does in this case must be deemed merely formal or unnecessary parties, or parties wrongfully joined "without any reasonable basis in fact." The complaint contained causes of action for breach of contract and various torts, based on respondents' allegations that an insurance policy covered a certain risk. The complaint did not allege that the Does committed any specific wrongdoing. Of course, the Does were not party to the subject insurance contract, and, unlike *Bryant*, this was not the type of case where Does were listed because the names of existing wrongdoers had not yet been ascertained. Indeed, as the district court held, if there were any representations made to respondents that could have substantiated respondents' claims, respondents naturally would have known of them. (Memorandum and Order of Judge Marilyn Hall Patel, May 7, 1986, attached as Appendix C, at C-6-8. Respondents were merely fishing, the Does were sham, and the Does should have been disregarded in any determination of removal jurisdiction.

Moreover, even if it could be proper to consider Does in determing whether diversity jurisdiction exists, it is not proper to presume *conclusively* that the Does are non-diverse real entities and not merely formal, unnecessary or wrongfully joined parties. As this Court has stated:

> It is always open to the non-resident defendant to show that the resident defendant has not been joined in good faith and for that reason should not be considered in determining the right to remove.

Pullman Co. v. Jenkins, 305 U.S. at 541 (emphasis added).

And, as this Court ruled in *Wilson, supra*:

> [The] right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy. If in such a case a resident defendant is joined, the joinder, although fair upon its face, may be shown

> by a petition for removal to be only a sham or fraudulent device to present a removal . . . .

Wilson, 257 U.S. at 97 (citation omitted). At the very least, *Bryant* contradicts the decisions of this Court that confirm that removing parties may attempt to establish that there is no nondiverse party who could rightfully be a party to the federal proceeding. *Bryant* provides an immutable, bright-line rule which, although perhaps convenient to apply, and likely successful in limiting the number of cases that reach federal court, ignores the possibility that federal jurisdiction exists despite a plaintiff's pleading of Does, and denies removing parties the opportunity to establish jurisdiction.[4]

2. The *Bryant* Rule Precludes Uniform Application of Federal Law

Removal jurisdiction requires, among other things, complete diversity of citizenship between or among all plaintiffs and all defendants. 28 U.S.C. §§ 1332, 1441. Federal law controls the determination of citizenship for diversity purposes. *Mas v. Perry*, 489 F.2d 1396, 1399 (5th Cir.), *cert. denied*, 419 U.S. 842 (1974); *Stifel v. Hopkins*, 477 F.2d 1116, 1120 (6th Cir. 1973); *City of Minneapolis v. Reum*, 56 Fed. 576, 580-81 (8th Cir. 1893). As this Court has held, federal removal law, including the determination of diversity of citizenship, should be applied in a consistent manner nationwide and should not be affected by

---

[4] The bright-line rule adopted in *Bryant* reflects the Ninth Circuit's concern with administrative convenience. In attempting to remedy what the Ninth Circuit described as confusion caused by its earlier decisions, the Ninth Circuit adopted the rule that it believed would be easiest to apply. *See Bryant*, 844 F.2d at 605-06. Of course, administrative ease is not a proper basis for decisions on removal and remand; the bases of removal and remand are set by Congress. *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976). Those congressional determinations cannot be changed by a court's desire to fashion its own rules. *See United Steelworkers of America v. R.H. Bouligny, Inc.*, 382 U.S. 145 (1965) (although unincorporated association had many of the attributes of a corporation, Congress had not defined its citizenship in the same way and thus it was not to be treated the same).

differences from state to state regarding the pleading of fictitious defendants. *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699, 705 (1972); *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 104 (1941) ("the Act of Congress must be construed as setting up its own criteria, irrespective of local law, for determining in what instances suits are to be removed from the state to the federal courts").

Bryant precludes the uniform application of federal removal law, allowing the vagaries of state pleading practice to influence the determination of whether federal jurisdiction exists. The Ninth Circuit rule conclusively presumes that diversity jurisdiction does not exist where Doe defendants are listed in the caption of the complaint. The federal interest in exercising jurisdiction conferred by Congress should not be defeated by a state procedural device—the pleading of phantoms—that plaintiffs typically employ "superstitiously and without reason." *Grigg v. Southern Pacific Company*, 246 F.2d 613, 620 (9th Cir. 1957). *See also Stewart Organization, Inc. v. Ricoh Corp.*, 108 S. Ct. 2239 (1988) (Alabama's categorical policy disfavoring forum selection clauses cannot be used to determine propriety of transfer of venue pursuant to 28 U.S.C. § 1404(a) because determination of venue in a diversity action must be made according to federal law); *Burlington Northern Ry. Co. v. Woods*, 480 U.S. 1 (1987). This is especially true where, as here, different states have different rules regarding the procedural practice. Some states, including California, allow the pleading of Does; other states do not. Under the *Bryant* rule, therefore, diversity of citizenship between the named parties would support removal in states where Doe pleading is prohibited, but would not support removal in other states where Does are permitted. It was the intent of Congress that federal jurisdiction be determined by the actual citizenship of real parties, not by conclusive presumptions arising from procedural practices peculiar to certain states. *See, e.g., Grubbs*, 405 U.S. at 705; *Shamrock Oil & Gas Corp.*, 313 U.S. at 104; *Bryant*, 844 F.2d at 610-12 (Kozinski, J., dissenting).

3. *Bryant* Conflicts With Federal Law and Congressional Policy Requiring Early Removal

Section 1446(b) of Title 28 provides in part:

> The petition for removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based . . .
>
> If the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

Section 1446(b) reflects the federal policy that removal occur as early in the case as possible. *Powers v. Chesapeake & Ohio Ry. Co.*, 169 U.S. 92, 100 (1898) ("This provision clearly manifests the intention of Congress that the petition for removal should be filed at the earliest possible opportunity.") *See* 3 Cong. Rec. 4302 (1874). There is good reason for this policy, as "[l]ate removals can be extremely disruptive, lead to serious duplication of effort and be manipulated for tactical advantage." *Bryant*, 844 F.2d at 611 (Kozinski, J., dissenting).

The Ninth Circuit's rule that a case containing Does cannot be removed until the Does are named, dismissed or dropped, or until trial commences without the Does having been served, ensures removal at a late stage in the litigation. Under California law a real entity can be substituted for a fictitious defendant at any time during the three years in which service of process may be made. Cal. Code Civ. Proc. § 583.210 (West Supp. 1988) (formerly § 581a(a)). Thus, under the Ninth Circuit's rule, the 30 days within which Congress requires removal, 28 U.S.C. § 1446(b), can become three years.

The Ninth Circuit's bright-line rule therefore conflicts with the congressional intent that removal occur as early as possible in the litigation.

4. *Bryant* Conflicts With Federal Law Precluding Remand After Final Judgment

In this case, the Ninth Circuit's order instructed the district court to remand the case to state court, even though the case had reached judgment before *Bryant* was decided. Respondents never contested jurisdiction or opposed removal or raised any question about Allstate's allegation that the Does were shams. Not only would the judgment in Allstate's favor be taken away, Allstate would have to relitigate matters on which it had already prevailed.[5] Besides the obvious effrontery to policies favoring the finality of judgments and judicial economy, the *Bryant* rule as applied here flies in the face of 28 U.S.C. § 1447(c) and the decisions of this Court which show that remand is proper only if it appears *prior* to judgment that the action was removed improvidently and without jurisdiciton.

Section 1447(c) provides:

> if at any time before final judgment it appears that the case was removed improvidently and without jurisdiciton, the district court shall remand the case . . . .

Thus, Section 1447(c) authorizes remand of cases improvidently removed *before*, not after, judgment.

In fact, this Court has held that remand is not proper after final judgment if there would have been jurisdiciton originally in the federal court. For example, in *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699 (1972), General Electric Credit Corp. (GECC) sued Grubbs in Texas state court. Grubbs filed a cross-complaint against the United States, and the United States removed the entire action to district court. GECC did not challenge the district court's jurisdiction. Grubbs prevailed at trial in the district court, but the Court of Appeals determined that

---

[5] The Ninth Circuit has adhered in other cases to its rule that judgments are invalid if they were rendered when Does were listed in the complaint but not formally dismissed. *See, e.g., Bryant*, 844 F.2d 602 (9th Cir. 1988); *Gamble v. General Foods Corp.*, 846 F.2d 51, 52-53 (9th Cir. 1988).

removal had not been authorized by statute. This Court reversed the Court of Appeals, holding that:

> where after removal a case is tried on the merits without objection and the federal court enters judgment, the issue in subsequent proceedings on appeal is not whether the case was properly removed, but *whether the federal district court would have had original jurisdiction of the case had it been filed in that court.*

405 U.S. at 702 (emphasis added). Because the citizenship of the parties and the amount in controversy satisfied the requirements of 28 U.S.C. § 1332, there was diversity jurisdiction in the district court. *Id.* at 704. Furthermore, the Court added, if the district court had diversity jurisdiction as between the parties governed by the judgment, the fact that there were other parties with other claims did not defeat the jurisdiction of the district court to enter judgment. *Id.* at 705.

As in *Grubbs,* this case was determined on the merits after removal, here on a motion to dismiss rather than at trial. Respondents made no attempt to remand the case or otherwise challenge the district court's jurisdiction before judgment. It is undisputed that the amount in controversy exceeds $25,000 and that there was complete diversity between the named plaintiffs and the named defendants. Remand was ordered only because of the presence of Does. The District Court therefore would have had jurisdiction over the case had it been filed in federal court, and the Ninth Circuit's order was thus improper and in conflict with *Grubbs.*

II

DISMISSAL OF THE APPEAL FOR LACK OF JURISDICTION CONFLICTS WITH FEDERAL LAW BY IMPROPERLY ELIMINATING THE DISTINCTION BETWEEN MOTIONS BROUGHT UNDER RULE 59(e) AND MOTIONS BROUGHT UNDER RULE 60(b)

This case presents an additional important question of federal law. Under Federal Rule of Appellate Procedure 4(a)(4), a

notice of appeal has no effect if it is filed before the disposition of a motion timely brought under Federal Rule of Civil Procedure 59(e). *See Acosta v. Louisiana Dep't of Health and Human Resources,* 478 U.S. 251 (1986) (per curiam); *Griggs v. Provident Consumer Discount Co.,* 459 U.S. 56 (1982). The pendency of a motion brought under Federal Rule of Civil Procedure 60(b), on the other hand, does not affect the time to appeal or prevent a timely notice of appeal from being effective. *See Miller v. Transamerican Press, Inc.,* 709 F.2d 524, 527-28 (9th Cir. 1983).

Here, respondents filed a "motion for reconsideration" of the district court's order dismissing their complaint with prejudice, nine days after the order was filed. Respondents stated that the motion was made pursuant to and was governed by Federal Rule of Civil Procedure 60(b), and the motion argued that the district court's order should be set aside due to the inadvertence and excusable neglect of respondents' counsel. Inadvertence and excusable neglect are grounds specifically mentioned in Rule 60(b)(1) as grounds to set aside a judgment.

While the Rule 60(b) motion was pending, respondents filed their notice of appeal. On July 1, 1987, a motions panel of the Ninth Circuit dismissed respondents' appeal for lack of jurisdiction because the Rule 60(b) motion was pending in the district court when respondents filed their notice of appeal. Apparently, the motions panel considered appellants' Rule 60(b) motion to be a Rule 59(e) motion subject to Rule 4(a)(4) because it was filed within ten days after the district court's dismissal order.

An important issue of civil procedure is at stake here: the drafters of the Federal Rules of Appellate Procedure consciously determined that motions brought under Rule 60 (unlike those brought under Rule 59(e)) should not delay the running of the time to appeal. Blurring the distinction between Rule 59(e) and Rule 60 motions because of the time the motion was filed, and without reference to the grounds on which the motion was based, frustrates the drafters' intent and conflicts with a decision in another circuit on the same issue.[6] Moreover, although this Court

---

[6] The decisions of the circuit courts of appeal are inconsistent on how to treat a postjudgment motion under Rule 4(a)(4). Several courts

Rule 60 motions and is therefore in conflict with the intent of the drafters of the federal rules.

The Ninth Circuit's decision is also in conflict with a decision of another court of appeals on the same matter. In *Butler v. Pearson*, 636 F.2d 526 (D.C. Cir. 1980), a diversity action was dismissed because the plantiffs failed to respond to the defendant's interrogatories. Plaintiffs filed a "Motion to Reconsider and Reinstate," alleging that the interrogatories had not been answered due to the inadvertance and busy schedule of their counsel. The Court of Appeals held that the motion to reconsider had to be construed as a motion brought pursuant to Rule 60(b), rather than Rule 59(e), because it "requested relief on the basis that the dismissal resulted in a 'forfeiture of Plaintiffs' rights through the *inadvertance* of their counsel' " and, although the motion did not state under what rule it was brought, it suggested a "*ground* for relief cognizable under Rule 60(b)." *Id.* at 529 (emphasis added). Here, not only did plaintiffs' motion for reconsideration seek relief on the basis of plaintiffs' counsel's inadvertance, "a ground for relief cognizable under Rule 60(b)," plaintiffs' motion was expressly brought pursuant to Rule 60(b). The Ninth Circuit's order in this case is therefore in conflict with the District of Columbia Circuit's decision in *Butler*.

Moreover, this Court has recognized that a post-judgment motion does not constitute a rule 59(e) motion if the post-judgment motion is necessarily predicated on a statute or rule other than Rule 59(e), regardless of when the motion is filed. *See, e.g., White v. New Hampshire Dep't of Employment Security*, 455 U.S. at 451-52. *See also Buchanan v. Stanships, Inc.*, 108 SCt. 1130 (1988) (per curiam) (motion for costs predicated on Rule 54(d) held not to be a Rule 59(e) motion even though defendants characterized motion as a Rule 59(e) motion).

In sum, respondents' motion for reconsideration could only be construed as a motion brought under Rule 60(b), their notice of appeal of July 7, 1986 was not void under Rule 4(a)(4), and the appeal therefore should not have been dismissed for lack of jurisdiction. Certiorari should be granted because the Ninth Circuit's order conflicts with the decision of another federal appeals court and because, despite the conflict between the circuit

courts of appeal and the important ramifications of the issue for federal appellate jurisdiction, this Court has not yet addressed the question of whether a motion brought on grounds peculiar to Rule 60(b) may be deemed a Rule 59(e) motion subject to Rule 4(a)(4) simply because of the time the motion was filed.

CONCLUSION

For these reasons, the petition for certiorari should be granted.

Dated: October 17, 1988

Respectfully submitted,

ROBERT E. FREITAS
Counsel of Record
CARL W. CHAMBERLIN
ORRICK, HERRINGTON &
SUTCLIFFE

DAVID E. BOCAN
DENENBERG, TUFFLEY,
BOCAN, JAMIESON,
BLACK, HOPKINS & EWALD
Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WALTER J. HERBERT, JR., et al.,
Plaintiffs-Appellants,

vs.

NORTHBROOK EXCESS AND SURPLUS INSURANCE COMPANY,
a corporation, et al.,
Defendants-Appellees.

No. 86-2275

DC# CV-86-0352-MHP
Northern California
(San Francisco)

ORDER

Filed July 1, 1987

Cathy A. Catterson, Clerk
U.S. Court of Appeals

Before: BROWNING, PREGERSON and ALARCON, Circuit Judges

The order of April 8, 1987 dismissing this appeal for failure to prosecute is vacated because it was based on a clerical error by this court. The appeal is dismissed for lack of jurisdiction. Fed. R. App. P. 4(a)(4).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WALTER J. HERBERT, JR., et al.,
Plaintiffs-Appellants,

vs.

NORTHBROOK EXCESS AND SURPLUS INSURANCE COMPANY, a corporation, et al.,
Defendants-Appellees.

No. 86-2275

DC# CV-86-0352-MHP
Northern California
(San Francisco)

ORDER

Filed July 20, 1988

Cathy A. Catterson, Clerk
U.S. Court of Appeals

Before: BROWNING, PREGERSON and ALARCON, Circuit Judges

Appellees' petition for rehearing is denied as moot and the suggestion for rehearing en banc is rejected. This matter is remanded to the district court with instructions to remand the matter to state court. *Bryant v. Ford Motor Co.*, 844 F.2d 602 (9th Cir. 1988).

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

WALTER J. HERBERT, JR., and NEIL J. SCHON,
Plaintiffs,

vs.

NORTHBROOK EXCESS AND SURPLUS INS., CO., et al.,
Defendants.

No. C-86-0352-MHP

MEMORANDUM AND ORDER

Filed May 7, 1986
William L. Whittaker, Clerk
U.S. District Court
No. Dist. of Ca.

Plaintiffs bring this action for defendant's alleged failure to indemnify plaintiffs pursuant to an insurance agreement between the parties. The action comes before this court on a motion to dismiss for failure to state a claim upon which relief may be granted. For the reasons stated below, defendant's motion is granted.

BACKGROUND

Plaintiffs invested in a tax shelter arrangement involving wind generators whereby they would benefit from various state and federal income tax credit provisions. Plaintiffs Herbert and Schon invested $600,000 and $300,000, respectively, on December 1982 allegedly based on assurances by the wind generator promoters (the "promoters") that the wind mills would be installed by December 31, 1982. This would enable plaintiffs to take the respective tax credits for the 1982 tax year.

On December 1, 1982, defendant issued a three year insurance policy to the promoters covering various risks. Included in the coverage was indemnification for losses arising from recapture of the state and federal tax credits. Plaintiffs were named as insureds on the policy.

After plaintiffs sought and obtained tax credits totalling $450,000, they learned that the wind generators had not been installed by December 31, 1982. This made the tax credits improper. Consequently, in September, 1984, plaintiffs were obligated to amend their 1982 tax returns and repay the amounts they had received as a result of the earlier tax credits, plus interest.

Defendant cancelled the policy on September 15, 1983 and returned a prorated amount to the promoters. Defendants refused to compensate plaintiffs for the amounts they paid in amending their 1982 tax returns. Consequently, plaintiffs filed this action in state court from which defendant removed it to this court.

DISCUSSION

The question at the heart of this action is whether the insurance agreement covers the kind of loss caused by the promoters' failure to install plaintiffs' wind generators before the December 31, 1981 deadline. The answer to that question is largely determinative of all of plaintiffs' claims with the exception of their unfair practices claim. It is, therefore, appropriate to look to the contract claims first.

Counts I & II

Plaintiffs have two contract claims against defendant. Count I alleges that defendant breached the written policy. Count II alleges an estoppel claim against defendant based on knowledge it had or should have had of plaintiffs' reliance on a particular type of coverage. Based on the pleadings before it, this court finds that neither count states a claim upon which relief may be granted.

In defense of the sufficiency of their contract claims, plaintiffs are quick to remind this court that dismissal under Rule 12(b)(6) is disfavored. They argue that once plaintiff has satisfied the short and plain statement of the claim requirement of the rules, *Fednav Ltd. v. Sterling International*, 572 F. Supp. 1268, 1270 (N.D. Cal. 1983), dismissal may not be ordered "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *California Dump Truck Owners Association v. Associated Gen-*

eral Contractors, 562 F.2d 607, 614 (9th Cir. 1977) (quoting *Conley v. Gibson*, 355 U.S. 41, 45 (1957)).

Plaintiffs, however, miscite *California Dump Truck* and misconstrue the test which the Supreme Court set out in *Conley*. In making its judgment, this court is limited to the pleadings before it. 2A J. Moore and J. Lucas, *Moore's Federal Practice* ¶ 12.07[2.-5] (2d ed. 1985). The court may also consider material which is submitted as part of the complaint. *Amfac Mortgage Corp. v. Arizona Mall of Tempe, Inc.*, 583 F.2d 426, 429-30 (9th Cir. 1978). In this case, such material includes the contested insurance policy which plaintiffs have incorporated into their complaint. Complaint at ¶ 7.

It is, as plaintiffs argue, hornbook law that ambiguity or uncertainty in an insurance policy must be resolved in favor of the insured. Coverage clauses are generally interpreted broadly so as to afford the greatest protection to the insured whereas exclusionary clauses are interpreted narrowly against the insurer. *State Farm Mutual Auto Insurance Co. v. Partridge*, 10 Cal. 3d 94, 101-2 (1973). Similarly the scope of coverage is to be construed with regard to the intent and *reasonable* expectations of the insured. *Interinsurance Exchange v. Macias*, 116 Cal. App. 3d 935, 938 (1981).

The rule that any ambiguity in an insurance contract will be resolved in favor of the insurer, however, is not without limitation. There must first be some actual or apparent ambiguity. *Safeco Title Insurance Co. v. Moskopoulos*, 116 Cal. App. 3d 658, 665 (1981). An examination of the policy in question reveals none. The policy provides in relevant part:

> Such insurance as is afforded by this policy for direct physical damage to equipment shall also apply to the indemnification of the named insured for loss . . . arising from code [I.R.C.] section 38 property being disposed of or ceasing to be code section 38 property within the meaning of the United States Internal Revenue Code of 1954 provided such loss occurs during the policy period.

The agreement goes on to define the terms investment credit and loss:

> (A) "Investment credit" shall mean the regular investment credit and energy property investment credit allowed against the insured's United States Federal Income Tax liability pursuant to section 46 of the United States Revenue Code of 1954.
> (B) "Loss" shall mean recapture of investment credits by the United States Government, as governed by section 47 of the United States Internal Revenue Code of 1954 and other relevant sections of that code.

Exhibit A to the Complaint. The policy provides the same coverage with respect to the recapture of state tax credits.

Used in this context, recapture is a technical term with a clear and unambiguous meaning, involving the recovery by the government of any tax benefit received by the taxpayer as a result of an allowed tax credit that later ceases to be allowable. *See* Treas. Reg. § 1.47-1 (1985). This occurs when for various reasons property ceases to be section 38 property under the code. I.R.C. § 471; *Charbonnet v. United States*, 455 F.2d 1195, 1198-99 (5th Cir. 1972).

The policy issued by defendant made explicit reference to I.R.C. § 47 and, by such reference, made clear the technical usage of the word recapture. For a taxpayer investing with an eye to tax credits the term recapture can only mean what the I.R.C. says it means, absent some representation to the contrary. Moreover, when the policy provision is put in the context of its discussion of the property ceasing to be § 38 property it is clear that defendant's agreement to indemnify the recapture of tax credits applied in a strictly technical sense. When a term has a clear technical meaning, the substitution of any other meaning is inappropriate. *Pendell v. Westland Life Insurance Co.*, 95 Cal. App.2d 766, 770 (1950). The contract here was not a complex adhesion contract with the limitations of liability buried in the midst of small type. Instead, the terms are clearly and unambiguously set out on a single page.

Plaintiff's arguments to the contrary are not persuasive. The term "loss" in the policy was clearly limited by the term "recapture" and that term, plaintiff's assertions notwithstanding, does not create any reasonable expectations of the broad coverage plaintiffs assert. Not only does recapture lack any common meaning to lay people, but the reference to I.R.C. § 47 makes clear its technical usage.

Plaintiffs also fail in their attempt to argue that the reference to "section 47 of the Internal Revenue Code and other relevant sections of the code," makes the provision unclear. With the exception of a similar provision for the recapture of depreciation allowances, there is no other application of the term in the Code. Thus, while the significance of reference to other sections of the code is unclear, it does not create the reasonable expectation that plaintiffs losses would be covered under the policy.

As a matter of law, therefore, this court concludes that the written policy issued by defendant was clear and unambiguous. The policy indemnified the recapture of tax credits, not all losses, as plaintiffs seem to contend. Since the wind generators were not installed, they never were section 38 property under the code and, therefore, not property upon which tax credits were allowable. Consequently, the losses sustained by plaintiffs were not covered by the policy. Count I of plaintiff's complaint is, therefore, dismissed.

As for plaintiffs' contract claim based on estoppel, it too must be dismissed. Plaintiffs allege that defendant knew or had reason to know that the promoters would not install the wind generators prior to December 31, 1982. Plaintiffs also allege that defendant knew or had reason to know that plaintiffs would rely on the offering of an insurance policy providing tax credit recapture coverage as part of the investment package. Finally, plaintiffs allege that they relied on the offering of such insurance. On the basis of these allegations, plaintiffs assert that defendant is estopped from denying coverage.

These allegations are insufficient to state a claim. Defendant's alleged representations to the effect that plaintiffs would suffer no recapture are insufficient to state an estoppel claim when neither

plaintiff suffered recapture. Plaintiffs have not alleged that defendant made any representations which would reasonably give them the idea that the policy would cover what happened to them. Given the specificity of the written instrument, such an allegation is vital.

At oral argument plaintiff's counsel acknowledged that no representations were made to his clients apart from the actual. When the court asked what other representations were made, he argued that they could not know until discovery was commenced. From this argument it is clear to the court that plaintiffs are simply trying to get their foot in the door and gain the opportunity to search defendant's records in the hope of finding something that will provide a viable claim.

It is equally obvious that if plaintiffs require discovery to learn what representations were made to them which caused them to believe that the policy would cover what happened to them, there were no such representations made. When it is clear to the court that no claim can be stated on the facts, it is appropriate for the court to simply dismiss the claim without leave to amend. 3 J. Moore, *Moore's Federal Practice*, ¶ 15.10 (2d ed. 1985); *Jones v. Community Redevelopment Agency*, 733 F.2d 646, 650 (9th Cir. 1984). To paraphrase this Circuit's admonition on the use of summary judgment, plaintiff should not be permitted to embark on discovery and full-blown litigation on "only a wing and a prayer." *Mutual Fund Investors, Inc. v. Putnam Management Co.*, 553 F.2d 620, 624 (9th Cir. 1977). Counts I and II of plaintiffs' complaint are therefore dismissed with prejudice.

Counts III & IV

Plaintiffs allege in Counts III and IV waiver and a breach of the covenant of good faith and fair dealing. Both of these claims are dependent on plaintiffs' contract claims. Because plaintiffs cannot state a contract claim, they cannot state either of these claims. Counts III and IV are, therefore, dismissed with prejudice.

Plaintiffs' Remaining Claims

Plaintiffs argued at their hearing that this court's ruling on the contract issues does not prejudice their other claims. Those claims, counts V and IX, include statutory violations of the California Insurance code, fraud, breach of fiduciary duties, intentional and negligent infliction of emotional distress and civil conspiracy. The court disagrees and dismisses the plaintiffs' entire complaint with prejudice.

Plaintiffs argued that they had made the necessary allegations to require the court to allow them to proceed to discovery. Plaintiffs, however, cannot simply rely on the incantation of legal conclusions to be given the opportunity to probe into the records of defendant. They must allege facts. *Jones*, 733 F.2d at 650-51. Thus far, plaintiffs have not alleged facts which state a claim. Furthermore, plaintiffs demonstrated that their suit is futile by their concessions that all the facts they could allege were already contained in their complaint.

Where, as is the case here, plaintiffs are on little more than a fishing expedition, the court need not allow the pursuit of a futile claim. *Klamath Lake Pharmaceutical Association v. Klamath Medical Service Bureau*, 701 F.2d 1276, 1293 (9th Cir.), *cert. denied*, 446 U.S. 822 (1983). Instead, it may dismiss the claim and deny leave to amend.

Thus, plaintiffs' allegation of statutory violations of the California Insurance Code may be dismissed. The relevant sections, Cal. Ins. Code §§ 790.03(h)(2)-(6) & (13) (West 1986 Supp.), provide a separate and distinct action for a bad faith action based on even a single violation of the statute. *Colonial Life and Accident Insurance Co. v. Superior Court*, 31 Cal. 3d 785, 791 (1982). Plaintiffs have not pled facts which support their claim. Instead, they have stated in conclusory terms how plaintiff "unreasonably" refused to pay plaintiffs, denied coverage of the policy and "unreasonably" delayed their investigation of plaintiffs' claims. Complaint at ¶ 32. Indeed, claims under subdivisions (h)(2), (3), (5) and (6) must fall by reason of this court's ruling on the contract. For example, under (2) and (3) there can be no "claims arising under" the policy. Nor, given the acknowledged

facts, can a claim be stated under (5) and (6). There are no facts alleged which establish a claim under any of these subparagraphs. Count V is therefore dismissed.

Similarly, plaintiffs' claim for fraud fails to successfully allege fraud. Plaintiffs must allege more than that defendant agreed to issue an insurance policy indemnifying losses stemming from recapture. As noted above, plaintiffs argued at the hearing that they could not allege further facts without discovery. As with their contract claims, it is ludicrous for plaintiffs to argue that they require discovery to know what statements made by defendant defrauded them. If any party should know what those statements were, it is plaintiffs.

Plaintiffs' claim for breach of fiduciary duties must also be dismissed. Under California law, the relationship between the insurer and its insured is a special relationship characterized by elements of fiduciary responsibility. *Seaman's Direct Buying Service, Inc. v. Standard Oil Co.*, 36 Cal. 3d 752, 768 (1984). The relationship, however, does not create a fiduciary relationship. *Kanne v. Connecticut General Life Insurance Co.*, 607 F. Supp. 899, 908 (C.D. Cal 1985). Instead, it provides in certain situations for a cause of action for the tortious breach of the covenant of good faith and fair dealing. There is no action for breach of fiduciary duty under California law. *Id.* Plaintiffs' claim is dismissed.

Finally, both plaintiffs' claims for emotional distress and their claim for civil conspiracy are dismissed. These claims all depend on the breach of some duty by defendant. Since plaintiffs have not successfully alleged any breaches, they cannot successfully state a claim for conspiracy or claims for emotional distress. Plaintiffs' reliance on *Molien v. Kaiser Foundation Hospitals*, 27 Cal. 3d 916 (1980), is misplaced. As this court's ruling on the contract claims indicates, there was nothing unreasonable about defendant's interpretation of the contract. It was therefore not reasonably foreseeable that defendants conduct would cause the alleged nervous condition to plaintiffs.

For the reasons set out above, the complaint is dismissed in its entirety with prejudice.

IT IS SO ORDERED.

Dated: May 7, 1986

MARILYN HALL PATEL
United States District Judge

APPENDIX D

28 U.S.C. § 1332

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States; . . .

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business . . .

28 U.S.C. § 1441

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim of right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction . . .

28 U.S.C. § 1446

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing

a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

(b) The petition for removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable. . . .

(d) Each petition for removal of a civil action or proceeding, except a petition in behalf of the United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

(e) Promptly after the filing of such petition for the removal of the civil action and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded. . . .

28 U.S.C. § 1447

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the petitioner to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

Fed. R. Civ. P. 59(e)

A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Fed. R. Civ. P. 60(b)

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a

judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Fed. R. App. P. 4(a)(4)

If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

Cal. Civ. Proc. Code § 474

When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint, or the affidavit if the action is commenced by affidavit, and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly; provided, that no default or default judgment shall be entered against a defendant so designated, unless it appears that the copy of the summons or other process, or, if there be no summons or process, the copy of the first pleading or notice served upon such defendant bore on the face thereof a notice stating in substance: "To the person served: You are hereby served in the within action (or proceedings) as (or on behalf of)

the person sued under the fictitious name of (designating it)." The certificate or affidavit of service must state the fictitious name under which such defendant was served and the fact that notice of identity was given by endorsement upon the document served as required by this section. The foregoing requirements for entry of a default or default judgment shall be applicable only as to fictitious names designated pursuant to this section and not in the event the plaintiff has sued the defendant by an erroneous name and shall not be applicable to entry of a default or default judgment based upon service, in the manner otherwise provided by law, of an amended pleading, process or notice designating defendant by his true name.

APPENDIX E

List of Allstate Insurance Company's parent, subsidiaries and affiliates (U.S. Sup. Ct. Rule 28.1).

Parent

Sears, Roebuck and Co.

Subsidiaries and Affiliates

Allstate Development Corporation
Allstate Enterprises, Inc.
Allstate Indemnity Company
Allstate Insurance Company of Canada
Allstate International Inc.
Allstate Investment Management Company
Allstate Life Insurance Company
Allstate Life Insurance Company of Canada
Allstate Life Insurance Company of New York
Allstate Motor Club Inc.
Allstate Property and Casualty Insurance Company
Allstate Reinsurance Co. Limited (United Kingdom)
American Rehab Products Inc.
Dur-O-Vol, Inc.
Dur-O-Vol, Ltd.
DWRD Insurance Holdings Inc.
Enterprises Service Corporation
Forty Fifth and Main Redevelopment Corporation
General Underwriters Agency, Inc.
Les Estimations Gilles Bordeleau Inc. (Canada)
Lincoln Benefit Life Company
Mature Outlook Inc.
Northbrook Indemnity Company
Northbrook Life Insurance Company
Northbrook National Insurance Company
Northbrook Property and Casualty Insurance Company
Omni Investors, Inc.
PMI Insurance Co.
PMI Mortgage Insurance Co.
PMI Securities Co.
Surety Life Insurance Company
Tech-Cor, Inc.